

DEPARTMENT OF CALIFORNIA HIGHWAY PATROL

INFORMATION AND BACKGROUND

49 US Code Chapter 51, Transportation of Hazardous Materials.

§ 5125. Preemption

- (a) General. - Except as provided in subsections (b), (c), and (e) of this section and unless authorized by another law of the United States, a requirement of a State, political subdivision of a State, or Indian tribe is preempted if -
 - (1) complying with a requirement of the State, political subdivision, or tribe and a requirement of this chapter or a regulation prescribed under this chapter is not possible; or
 - (2) the requirement of the State, political subdivision, or tribe, as applied or enforced, is an obstacle to accomplishing and carrying out this chapter or a regulation prescribed under this chapter.
- (b) Substantive Differences. - (1) Except as provided in subsection (c) of this section and unless authorized by another law of the United States, a law, regulation, order, or other requirement of a State, political subdivision of a State, or Indian tribe about any of the following subjects, that is not substantively the same as a provision of this chapter or a regulation prescribed under this chapter, is preempted:
 - (A) the designation, description, and classification of hazardous material.
 - (B) the packing, repacking, handling, labeling, marking, and placarding of hazardous material.
 - (C) the preparation, execution, and use of shipping documents related to hazardous material and requirements related to the number, contents, and placement of those documents.
 - (D) the written notification, recording, and reporting of the unintentional release in transportation of hazardous material.
 - (E) the design, manufacturing, fabricating, marking, maintenance, reconditioning, repairing, or testing of a packaging or a container represented, marked, certified, or sold as qualified for use in transporting hazardous material. (2) If the Secretary of Transportation prescribes or has prescribed under section 5103(b), 5104, 5110, or 5112 of this title or prior comparable provision of law a regulation or standard related to a subject referred to in paragraph (1) of this subsection, a State, political subdivision of a State, or Indian tribe may prescribe, issue, maintain, and enforce only a law, regulation, standard, or order about the subject that is substantively the same as a provision of this chapter or a regulation prescribed or order issued under this chapter. The Secretary shall decide on and publish in the Federal Register the effective date of section 5103(b) of this title for any regulation or standard about any of those subjects that the Secretary prescribes after November 16, 1990. However, the effective date may not be earlier than 90 days after the Secretary prescribes the regulation or standard nor later than the last day of the 2-year period beginning on the date the Secretary prescribes the regulation or standard. (3) If a State, political subdivision of a State, or Indian tribe imposes a fine or penalty the Secretary decides is appropriate for a violation related to a subject referred to in paragraph (1) of this subsection, an additional fine or penalty may not be imposed by any other authority.
- (c) Compliance With Section 5112(b) Regulations. - (1) Except as provided in paragraph (2) of this subsection, after the last day of the 2-year period beginning on the date a regulation is prescribed under section 5112(b) of this title, a State or Indian tribe may establish, maintain, or enforce a highway routing designation over which hazardous material may or may not be transported by motor vehicles, or a limitation or requirement related to highway routing, only if the designation, limitation, or requirement complies with section 5112(b). (2)(A) A highway routing designation, limitation, or requirement established before the date a regulation is prescribed under section 5112(b) of this title does not have to comply with section 5112(b)(1)(B), (C), and (F). (B) This subsection and section 5112 of this title do not require a State or Indian tribe to comply with section 5112(b)(1)(I) if the highway routing designation, limitation, or requirement was established before November 16, 1990. (C) The Secretary may allow a highway routing designation, limitation, or requirement to continue in effect until a dispute related to the designation, limitation, or requirement is resolved under section 5112(d) of this title.
- (d) Decisions on Preemption. - (1) A person (including a State, political subdivision of a State, or Indian tribe) directly affected by a requirement of a State, political subdivision, or tribe may apply to the Secretary, as provided by regulations prescribed by the Secretary, for a decision on whether the requirement is preempted by subsection (a), (b)(1), or (c) of this section. The Secretary shall publish notice of the application in the Federal Register. The Secretary shall issue a decision on an

application for a determination within 180 days after the date of the publication of the notice of having received such application, or the Secretary shall publish a statement in the Federal Register of the reason why the Secretary's decision on the application is delayed, along with an estimate of the additional time necessary before the decision is made. After notice is published, an applicant may not seek judicial relief on the same or substantially the same issue until the Secretary takes final action on the application or until 180 days after the application is filed, whichever occurs first. (2) After consulting with States, political subdivisions of States, and Indian tribes, the Secretary shall prescribe regulations for carrying out paragraph (1) of this subsection. (3) Subsection (a) of this section does not prevent a State, political subdivision of a State, or Indian tribe, or another person directly affected by a requirement, from seeking a decision on preemption from a court of competent jurisdiction instead of applying to the Secretary under paragraph (1) of this subsection.

- (e) Waiver of Preemption. - A State, political subdivision of a State, or Indian tribe may apply to the Secretary for a waiver of preemption of a requirement the State, political subdivision, or tribe acknowledges is preempted by subsection (a), (b)(1), or (c) of this section. Under a procedure the Secretary prescribes by regulation, the Secretary may waive preemption on deciding the requirement -
 - (1) provides the public at least as much protection as do requirements of this chapter and regulations prescribed under this chapter; and
 - (2) is not an unreasonable burden on commerce.
- (f) Judicial Review. - A party to a proceeding under subsection (d) or (e) of this section may bring a civil action in an appropriate district court of the United States for judicial review of the decision of the Secretary not later than 60 days after the decision becomes final.
- (g) Fees. - (1) A State, political subdivision of a State, or Indian tribe may impose a fee related to transporting hazardous material only if the fee is fair and used for a purpose related to transporting hazardous material, including enforcement and planning, developing, and maintaining a capability for emergency response. (2) A State or political subdivision thereof or Indian tribe that levies a fee in connection with the transportation of hazardous materials shall, upon the Secretary's request, report to the Secretary on -
 - (A) the basis on which the fee is levied upon persons involved in such transportation;
 - (B) the purposes for which the revenues from the fee are used;
 - (C) the annual total amount of the revenues collected from the fee; and
 - (D) such other matters as the Secretary requests.

DEPARTMENT OF CALIFORNIA HIGHWAY PATROL

INFORMATION AND BACKGROUND

Final rule on Docket HM-200; Hazardous Material in Intrastate Commerce.

Wednesday
January 8, 1997

Part IV

**Department of
Transportation**

**Research and Special Programs
Administration**

**49 CFR Part 171, et al.
Hazardous Materials in Intrastate
Commerce and Improvements to
Hazardous Materials Identification
Systems; Final Rules**

DEPARTMENT OF TRANSPORTATION**Research and Special Programs Administration****49 CFR Parts 171, 173 and 180**

[Docket HM-200; Amdt. Nos. 171-150, 173-259, and 180-11]

RIN 2137-AB37

Hazardous Materials in Intrastate Commerce

AGENCY: Research and Special Programs Administration (RSPA), DOT.

ACTION: Final rule.

SUMMARY: This final rule requires that all intrastate shippers and carriers comply with the Hazardous Materials Regulations (HMR) with certain exceptions. This action is necessary to comply with amendments to the Federal hazardous materials transportation law mandating that DOT regulate the transportation of hazardous materials in intrastate commerce. The intended effect of this rule is to raise the level of safety in the transportation of hazardous materials by applying a uniform system of safety regulations to all hazardous materials transported in commerce throughout the United States.

DATES: Effective date: October 1, 1997.*Permissive compliance date:*

Compliance with the requirements as adopted herein is authorized as of April 8, 1997. This time period provides sufficient time for receipt and resolution of any petitions for reconsideration received on this final rule.

FOR FURTHER INFORMATION CONTACT:

Diane LaValle or Deborah Boothe, (202) 366-8553, Office of Hazardous Materials Standards, RSPA, 400 Seventh Street, SW., Washington, DC 20590-0001.

SUPPLEMENTARY INFORMATION:**I. Background**

Currently, the Hazardous Materials Regulations (HMR; 49 CFR parts 171-180) do not apply to highway transportation by intrastate carriers, except for the transportation of hazardous substances, hazardous wastes, marine pollutants, and flammable cryogenic liquids in portable tanks and cargo tanks. The HMR apply to all hazardous materials transported in commerce by rail car, aircraft, or vessel. A July 1986 report by the Office of Technology Assessment (OTA), then an agency of Congress, entitled "Transportation of Hazardous Materials," highlighted the need for national uniformity in the regulation of hazardous materials transportation and packaging requirements.

In response to the OTA report, RSPA published an advance notice of proposed rulemaking in the Federal Register on June 29, 1987 [52 FR 24195] which requested comments on extending the application of the HMR to all intrastate transportation in commerce as a means of promoting national uniformity and transportation safety. In 1990, the Federal hazardous material transportation law was amended to require the Secretary to regulate hazardous materials transportation in intrastate commerce. 49 U.S.C. 5103(b)(1)

RSPA proposed to extend the application of the HMR to all intrastate transportation of hazardous materials in commerce in a notice of proposed rulemaking (NPRM) published on July 9, 1993 [58 FR 36920]. A correction to the NPRM was published on July 15, 1993 [58 FR 38111]. The NPRM requested comments on the need for, and possible consequences of, extending the application of the HMR to all intrastate transportation of hazardous materials in commerce.

More than 200 comments were received in response to the NPRM. While most of the commenters supported the idea of uniformity, a significant number requested relief from the application of the HMR (or portions thereof). Among the concerns expressed were the appropriateness of regulating: (1) Small quantities of hazardous materials that are used incidental to a primary business that is other than transportation; and (2) the operation of small cargo tank motor vehicles.

The major objections raised were that: (1) uniform treatment of all intrastate hazmat shippers and carriers under the HMR would be extremely detrimental to rural and small businesses, including petroleum marketers and farmers; (2) although all States have adopted the HMR, certain States have deviated from the regulations, particularly regarding highway shipments, e.g., by "grandfathering" non-DOT specification cargo tanks, or exempting farm operations; and (3) regulation of user quantities of hazardous materials transported incidental to the primary responsibility of the carrier (i.e., materials of trade) could create burdens for these carriers.

In response to comments to the NPRM, RSPA published a supplemental notice of proposed rulemaking (SNPRM) in the Federal Register on March 20, 1996 [61 FR 11484]. The three proposals addressed in the SNPRM were exceptions from the HMR for: (1) "Materials of trade," (2) non-specification small cargo tank motor vehicles (i.e., less than 13,250 liters

(3,500 gallon) capacity) used exclusively in intrastate transportation of flammable liquid petroleum products, and (3) certain requirements addressing use of registered inspectors for these small cargo tank motor vehicles used to transport flammable liquid petroleum fuels.

II. Summary of Regulatory Amendments

RSPA received more than 1200 comments on the SNPRM from a variety of organizations, including trade associations, petroleum marketers, public service commissions, state police, farmers and farm co-operatives, water and power companies, members of Congress, State and Federal government agencies, waste haulers and fertilizer associations.

A. Extension of the HMR to Intrastate Transportation

Commenters in support of the expansion of the HMR to intrastate carriage stated that deviations from a uniform domestic scheme should be minimized. One commenter stated that the report by OTA entitled "Transportation of Hazardous Materials" was right on target by identifying the need for uniformity in transportation of hazardous materials, and that the action taken by RSPA in response to the report and the Federal hazardous materials transportation law was correct.

Petroleum marketers and the agricultural community, many of whom are small businesses, opposed extending the HMR to intrastate movement of hazardous materials. Some of these commenters stated that the additional requirements, such as for shipping papers and placarding, would provide little or no benefit to public safety when compared to the increased cost of regulation. These commenters urged RSPA to issue an exception from the regulations that recognizes the needs of agricultural producers by waiving the application of certain requirements of the HMR. Other commenters expressed concerns about the requirements for specification cargo tanks used to transport hazardous materials (other than combustible liquids) and stated that the cost of retrofitting non-specification cargo tanks would be prohibitive.

As required by the Federal hazardous materials transportation law, this rule extends the application of the HMR to intrastate transportation of hazardous materials by highway and provides exceptions for: (1) Materials of trade transported by interstate and intrastate motor carriers; (2) certain non-

specification packagings in intrastate transportation; (3) inspectors of small cargo tank motor vehicles, used for flammable liquid petroleum fuels in interstate and intrastate transportation; and (4) certain agricultural products transported in intrastate commerce under specified conditions. Section 171.1 is revised to extend the scope of the HMR to intrastate transportation of hazardous materials. In addition § 171.8 is reorganized for clarity and therefore republished in its entirety for the convenience of the reader.

B. Exceptions for Materials of Trade

Prompted by comments submitted to the NPRM and petitions for rulemaking, RSPA proposed in the SNPRM to limit regulatory requirements for the transportation of certain hazardous materials used as materials of trade. Factors leading to RSPA's determination included: (1) The relatively small quantity of these hazardous materials that are normally carried on a motor vehicle; (2) the general reliance on a DOT specification or U.N. standard packaging (or components thereof) as the principal packaging; and (3) a motor vehicle operator's familiarity with the hazardous material being transported.

Materials of trade include, subject to certain limitations, hazardous materials carried on a motor vehicle for protecting the health and safety of the motor vehicle operator (such as insect repellent or self-contained breathing apparatus) or for supporting the operation or maintenance of a motor vehicle (such as a spare battery or engine starting fluid). They also include certain hazardous materials carried by a private motor carrier engaged in a principal business which is other than transportation, such as lawn care, plumbing, welding, door-to-door sale of consumer goods, and farm operations.

In proposed § 173.6, RSPA identified types and quantities of hazardous materials for which exceptions would be provided. Specific limitations (such as maximum gross weight of materials of trade that may be carried on a motor vehicle) and safety provisions (such as packaging and hazard communication) were proposed to strike a balance between safety and the impact of full application of the HMR.

Most commenters to the SNPRM supported the materials of trade proposal, and offered many suggestions for its modification or expansion.

¹ Definition of material of trade § 171.8)

One commenter requested that the first two criteria (carried for the purpose of protecting the health and safety of the

motor vehicle operator or passengers; and carried for the purpose of supporting the operation or maintenance of the motor vehicle) should be expanded to all modes allowing materials of trade to be carried by air or water. The same commenter also requested that the third criteria (carried by a private carrier in direct support of a principal business that is other than transportation) should be limited to materials used that day which would limit the scope of the materials of trade exception. Two commenters requested that RSPA expand the third criteria of the definition from private motor carrier to include use of a contract carrier dedicated to a private carrier (i.e., an exclusive use contract carrier). In addition, some commenters noted that the materials of trade definition would exclude maintenance vehicles such as tow trucks and railroad motor vehicles that carry materials of trade for the purpose of supporting the operation or maintenance of another motor vehicle or a rail car.

RSPA believes that the materials of trade exception should apply only to highway transportation, as proposed. The HMR already provide modal exceptions for certain hazardous materials used as carrier's equipment and supplies (e.g., § 175.10). This final rule is intended to provide similar relief for highway transportation. The second criteria, however, is expanded to include maintenance vehicles that carry materials of trade for the purpose of supporting the operation or maintenance of motor vehicles rather than "the motor vehicle on which it is carried" as was originally proposed. Under the third criteria, any private carrier, including a railroad operating its motor vehicles in maintenance-of-way service, is eligible for the materials of trade exception. RSPA did not intend to limit the materials of trade exception to materials used the same day. Rather, the primary factor is that the hazardous material is used incidental to the private carrier's principal business.

2. Limitation of Materials of Trade Exception to Certain Classes of Hazardous Materials (§ 173.6(a))

Commenters requested inclusion of the following additional classes and divisions of hazardous materials within the materials of trade exception: Test kits containing Division 4.3 materials; Power cartridge devices, Division 1.4; Division 1.4S igniters used by railroads for welding rail; Division 1.4G railway torpedoes; Division 6.2 infectious substances (home health care);

Display fireworks; and Chlorine gas in 20-pound cylinders.

RSPA agrees that test kits containing small amounts of Division 4.3 materials may be safely transported as materials of trade. These types of test kits are frequently transported and used by electric utilities and used oil handlers and contain very small quantities of a Division 4.3 material. Therefore, § 173.6 includes Division 4.3 materials when transported in quantities that correspond to the small quantity exceptions in § 173.4. A power device cartridge (used to project fastening devices) which is classified in Division 1.4 Compatibility Group S (1.4S) may be reclassified as ORM-D if transported in accordance with the requirements of § 173.63(b). A power cartridge device that is reclassified as ORM-D meets the criteria for a material of trade.

The level of hazard posed by other materials suggested by commenters is not consistent with the intent of the materials of trade exception. For that reason, explosives such as igniters used for welding rail, railway torpedoes, Division 6.2 materials (infectious substances and regulated medical waste), Division 2.3 materials (such as chlorine gas, a poison by inhalation material in Hazard Zone B) and display fireworks are not included in the materials of trade exception.

3. Gross Mass or Capacity of Packagings for Materials of Trade (§ 173.6(a))

Some commenters requested that larger container capacities be authorized for materials of trade, such as a permanently attached tanks having a capacity not greater than 400 gallons for dilute mixtures of hazardous materials.

Commenters expressed concern that, while a small container filled with a concentrated hazardous material may meet the criteria for material of trade, when the same amount is transported in an aqueous solution in a bulk packaging, it no longer qualifies for the material of trade exception. An example is chlorpyrifos, a pesticide, which has a reportable quantity of one pound. As a concentrate, chlorpyrifos would qualify as a material of trade. However, due to its one-pound reportable quantity, when diluted with water in a 300-gallon capacity cargo tank or portable tank to the 1 or 2 percent concentration in which the product is normally applied, the tank will contain a reportable quantity and would be a hazardous substance subject to the HMR as a Class 9 material. Notwithstanding the fact that the same amount of chlorpyrifos (in concentrated form) would be excepted from most regulatory requirements when transported in conformance with

§ 173.6, under the proposal a tank of diluted material would not be subject to regulatory relief. In some cases these solutions may be diluted to such an extent that they are no longer subject to the HMR. RSPA agrees that the increased volume that comes with dilution poses no additional threat to the environment. Accordingly, § 173.6(a)(1)(iii) authorizes a dilute mixture (up to 2 percent concentration) in a non-specification bulk packaging having a capacity equal to or less than 1500 liters (400 gallons) when properly classed as a Class 9 liquid. A material of trade is authorized in a packaging having a maximum capacity of 30 liters (8 gallons). When the 30 liter quantity is diluted with 1500 liters of water, it produces a 2 percent concentration mixture. A condition specified in § 173.6(c)(2) requires that the bulk packaging (capacity greater than 119 gallons) containing the diluted material of trade must be marked with the four-digit identification number marking (as prescribed by § 172.332) to be authorized for transportation as a material of trade.

4. Materials Excluded From the Materials of Trade Exception (§ 173.6(a)(4))

A few commenters stated that hazardous materials associated with the identification numbers UN2924 and UN2925 should not be excluded from the materials of trade exception. These commenters contended that other dual hazard materials are authorized under proposed § 173.6(a)(1), and use of a generic proper shipping name for such dual hazard materials is not reason to exclude them from the materials of trade exception. Commenters also stated that the list of prohibited hazardous materials associated with certain identification numbers was recently removed from the small quantity exception in § 173.4. RSPA agrees and the identification numbers proposed for inclusion in paragraph (a)(4) are not adopted.

Commenters requested clarification on the inclusion of hazardous wastes as materials of trade. RSPA confirms that hazardous wastes are not included in the materials of trade exception. Inclusion of hazardous wastes as materials of trade would conflict with other requirements such as those pertaining to manifests (40 CFR Part 262 and 49 CFR 171.3 and 172.205).

5. Packaging for Materials of Trade (§ 173.6(b))

Many commenters requested clarification of the packaging requirements for materials of trade.

Some commenters stated that it would not be possible to determine whether a non-tested package has equal or greater strength and integrity as one that meets DOT's performance standards. Another commenter stated that the packaging requirements for materials that are not manufactured should be clarified. No alternatives were suggested by commenters.

By requiring the manufacturer's original packaging, RSPA is effectively requiring DOT-authorized packagings or their equivalent for materials of trade. A packaging that has equal or greater strength and integrity should be capable of passing the performance tests required for a packaging for that particular hazardous material. As with all hazardous materials packagings, the packaging must be compatible with the lading. If the manufacturer's original packaging is not available, shippers may refer to the HMR to determine what type of packaging is authorized or required and then make a determination as to what packaging may be used for that material of trade. If doubt remains, shippers and carriers are advised to use a specification packaging.

Commenters also requested an exception from the packaging requirements for salespersons to transport hazardous materials in an open box. An exception is already provided from the outer packaging requirements for receptacles that are secured against movement in cages, carts, bins, boxes or compartments in § 173.6(b)(3). Therefore, a salesperson may transport an open box containing inner receptacles as long as they are secured against movement.

One commenter stated that requirements for packaging gasoline should reference the Occupational Safety and Health Administration's (OSHA) regulations applicable to construction activities (29 CFR 1926.152). These OSHA requirements address storage and use of gasoline at construction sites rather than transportation. The OSHA standard that addresses safety cans for gasoline is 29 CFR 1910.106 which is referenced as an option for packaging gasoline in § 173.6(b)(4).

One commenter stated that RSPA should require that all cylinders have the gauge removed and a protective cap in place for cylinders capable of receiving a cap. Another commenter asked whether manifolding is authorized for compressed gas cylinders. RSPA believes that it is unnecessary for cylinders to have the gauges removed and protective caps in place. Section 173.6(b)(1) requires all materials of trade packages to be

securely closed, secured against movement, and protected against damage. Accordingly, all valves must be closed on all cylinders, but manifolding of cylinders charged with gases that are materials of trade is not prohibited.

6. Hazard Communication (§ 173.6(c))

Several large shipping and manufacturing companies requested that the materials of trade marking requirement include the manufacturer's name and telephone number, precautionary/warning statements, trade name and associated hazard, or at least the proper shipping name and identification number.

RSPA is satisfied that marking each package with an indication of the hazardous material it contains (with the addition of marking "RQ" on a package containing a reportable quantity of a hazardous substance) is adequate for a material of trade. In case of a spill, carriers need to know if the spill needs to be reported to the National Response Center, thus the requirement for the "RQ" marking. Additional marking requirements would be of small value due to the quantity limits of most hazardous materials allowed under the materials of trade exception, and in view of the fact that a cylinder containing compressed gas must bear the required DOT hazard warning label. A provision is added in § 173.6(c)(1) to require a packaging to be marked "RQ" when it contains a hazardous substance in a reportable quantity.

One commenter stated that vehicle operators should be made aware of appropriate emergency action. A few of the commenters believe that hazardous materials require more than a passing knowledge that they exist to transport them safely. One commenter stated that carriers should still be required to provide training for their employees.

One purpose of the materials of trade exception is to provide appropriate relief to private carriers transporting small quantities of hazardous materials. These private carriers generally transport the same types of materials repeatedly. Through experience, they gain a basic knowledge of the hazardous material being transported. RSPA does not believe these types and quantities of hazardous materials warrant more restrictive regulation than what was proposed other than the retention of the "RQ" marking requirement, which has been in effect since 1980.

7. Aggregate gross weight of materials of trade on a vehicle (§ 173.6(d))

Many commenters wanted the maximum gross weight allowed on the vehicle raised from 150 kg (330

pounds), especially when transporting compressed gas cylinders. They stated that cylinders can weigh up to 200 pounds each, and various commenters suggested raising the weight restriction to levels between 500 and 1000 pounds. RSPA agrees that steel cylinders could easily exceed the maximum gross weight for materials of trade on a transport vehicle. Paragraph (d) allows a maximum gross weight of 200 kg (440 pounds) which would typically accommodate two cylinders of compressed gas, each having a gross weight of 100 kg (220 pounds) as limited by § 173.6(a)(2).

C. Exceptions for Certain Non-Specification Packagings Used in Intrastate Transportation (§ 173.8)

The proposals in § 173.8 generated numerous comments both in support of the proposals and in opposition to the exceptions proposed. Comments in support of the proposals were generally submitted by petroleum marketer associations and individual marketers. Comments opposed to the proposals were submitted by State agencies, chemical manufacturers, interstate motor carrier associations, and the National Transportation Safety Board (NTSB).

Some commenters, such as the NTSB, oppose any use in hazardous materials service (other than for combustible liquids) of any non-specification cargo tank past the three year transition provision proposed in the SNPRM. Commenters, including State agencies, stated that an authorization to allow the continued use of non-specification cargo tanks beyond the three year transition period will continue to place the public at risk, by allowing substandard levels of safety. Commenters believe that the level of potential hazard presented by a cargo tank motor vehicle of less than 3,500 gallons is comparable to risks presented by larger cargo tanks and that the fact that these cargo tank motor vehicles operate within a single State does not diminish the risk. The Hazardous Materials Advisory Council stated that deviations from a uniform domestic regulatory scheme should be minimized. The State Police of Idaho described a scenario involving a small cargo tank motor vehicle that resulted in a major hazardous materials incident and forest fire. As a result of this incident, Idaho implemented a complete statewide inspection program on similar type motor vehicles. In support of their opposition to the proposal in this section the Idaho State Police stated:

The result of this incident caused us to complete a statewide inspection effort on all similar type vehicles. We were alarmed at

what we found. Several tanks of the same size as the one involved with the fire were found to have the same type of leaks, going directly on the exhaust system under the tank. Other violations noted included domes with missing seals, inspections that were many years expired, many drivers with no hazardous materials training at all, and much of the equipment in disrepair. We found that in many cases the people operating this type of tankers had just bought the business and started hauling gasoline * * *.

* * * Yet we found a huge majority of this type of tankers that were literally bombs waiting to go off. We believe this is not a problem unique to Idaho, and it is representative of this type of tankers across the nation.

There are many reasons for the poor condition of this type of tankers. They typically travel state and county roads. They rarely, if ever travel through ports of entry or weigh stations and are almost never inspected. Yet, this type of vehicle in a poor state of repair present the greatest danger to safety when compared to large semi-tanker type units.

Small "Mom and Pop" tanks load and unload right next to homes, schools, hospitals and businesses of all kinds and sizes. They are close to large numbers of people as they travel around loading and unloading. Yet the drivers/owners/operators have the least training and the poorest equipment.

Comments in support of the proposed exceptions provided in this section state that the proposal is a good first step in reducing the regulatory burdens on the small business petroleum marketer. Commenters believe that States should be allowed to provide exceptions for businesses within their State. They stated that the safety record of these small cargo tank motor vehicles is very good. They also state that it would be extremely burdensome to totally replace the fleet of non-specification cargo tanks with specification cargo tanks, without quantifiable data that demonstrate significant increases in safety.

RSPA believes that the exceptions provided in § 173.8 are responsive to concerns about the economic and regulatory impacts on small businesses that currently operate non-specification small cargo tanks. RSPA also believes that the conditions prescribed in this section provide for an acceptable level of safety. As provided in this final rule, a small non-specification cargo tank motor vehicle may only be operated by an intrastate motor carrier of flammable liquid petroleum products in a State that allows its use and it must be operated in conformance with the requirements of that State. In addition, after June 30, 2000, the tank would have to meet the Part 180 requirements (except for § 180.405(g)) in the same manner as required for DOT MC 306 cargo tank motor vehicles. Since the

exception for continued use of non-specification cargo tanks applies only to those in operation within a State prior to July 1, 1998, no additional non-specification cargo tanks may be placed in service after that date. Therefore, as the non-specification cargo tanks are replaced, they would be replaced with cargo tanks meeting the specification requirements of the HMR.

The Petroleum Marketers Association of America (PMAA) requested that RSPA extend the date that a non-specification cargo tank may be authorized by a state statute or regulation. They requested an additional two years, until July 1, 1998, so that state legislatures would be able to provide such exceptions prior to implementation of these regulations. As requested, the dates within this section have been revised to provide an additional two years for States to incorporate any additional exceptions in their State laws or regulations. Additionally, a three year transition was intended for bulk packagings under § 173.8 (a) and (d)(6); therefore, the dates referenced in these paragraphs have been changed to read "June 30, 2000."

PMAA also asked that RSPA adopt a "truck by truck interpretation" of what constitutes an "intrastate motor carrier," because it believes that a company should not be considered an interstate carrier of hazardous materials when its hazardous materials vehicles never leave its "home" State, but other vehicles used by the carrier transport non-hazardous materials across State lines. In addition, PMAA asked that "intrastate" transportation be interpreted to include movements that are no more than 100 miles outside the carrier's "home" State, because one delivery out of State "to a person who would otherwise never receive any gasoline or diesel fuel * * * will cause all of the other trucks in the fleet to be subject to the federal HMR."

In essence, PMAA is asking RSPA to create new exceptions from requirements in the HMR that have, for many years, been applicable to all interstate motor carriers. If RSPA were to adopt PMAA's request, regarding movements up to 100 miles, an adjacent State would be compelled to accept exceptions that apply in a carrier's "home" State even if those exceptions had not been adopted in the adjacent State. RSPA has consistently interpreted "interstate motor carrier" as any carrier that, in the course of its business, travels between States, or between a State and a foreign country, or between two points in a single State through another State or a foreign country. For this reason,

RSPA believes that the proper meaning of the term "intrastate commerce," as used in 49 U.S.C. 5103(b)(1) and the HMR, includes only those carriers who transport property or persons solely within the boundaries of a single State.

One commenter requested that the capacity of a cargo tank motor vehicle be revised to read "3,500 gallons or less" rather than "less than 3,500 gallons." RSPA is not adopting this request. Limiting the capacity of these cargo tanks to "less than 3,500 gallons" is consistent with the registration requirements in § 107.601.

The California Highway Patrol (CHP) stated that the proposed volume limitations are inadequate for gasoline used to refuel other vehicles and equipment. According to CHP, in the State of California currently there are thousands of tanks smaller than 119 gallons used to transport gasoline as cargo. These tanks are permanently secured to transport vehicles and are protected from damage or leakage in the event of a rollover. CHP states that these tanks provide farm, timber and construction industries with a practical, safe and economical means of dispensing gasoline for equipment used on job sites. Currently, these packagings are not considered cargo tanks, since by definition a cargo tank is a bulk packaging (i.e., has a capacity greater than 119 gallons). Since the small 119-gallon tanks are not cargo tanks they are not covered by the exceptions provided in this section. RSPA has determined that the exception in proposed § 173.8 for small "cargo tanks" used to transport flammable liquid petroleum products should be equally applicable to non-bulk metal permanently secured tanks that are authorized by the State in which they are transported. Therefore, a provision is added in paragraph (c) to authorize non-bulk tanks, that are permanently mounted and protected against leakage or damage in the event of a turnover, for transportation of flammable liquid petroleum products. As such, after June 30, 2000, these non-bulk tanks would be required to meet the part 180 inspection and testing requirements (except § 180.405(g) which addresses manhole assemblies) as if they were MC 306 cargo tank motor vehicles. Packagings that cannot meet the part 180 requirements must be removed from hazardous materials service by the end of the three year transition period, consistent with the transition period for other non-specification bulk packagings authorized under § 173.8 (b) and (c).

The Petroleum Marketers of Iowa (PMI) requested that RSPA delay publication of this final rule as it relates

to the hydrostatic or pressure testing of cargo tanks used in intrastate transportation. PMI states that they are in the process of requesting that the Iowa State University Center for Nondestructive Testing conduct a review and study of the testing of these cargo tanks. RSPA is not delaying publication of this final rule as requested by PMI because any proposal for alternative non-destructive testing procedures for cargo tanks would be beyond the scope of this rulemaking proceeding. In addition, a three-year transition period is being provided for application of the testing and inspection requirements of Part 180 to intrastate carriers. This should be sufficient time for the submission and handling of a well supported petition for rulemaking on the subject. Adoption of alternative or substitute testing procedures for the currently required hydrostatic and pressure testing requirements for cargo tanks could have a substantial effect on the manner of determining the continuing qualification and integrity of all cargo tanks, specification and non-specification alike. RSPA has encouraged PMI to consult with potentially affected parties, such as the Truck Trailer Manufacturers Association, National Tank Truck Carriers, Inc., the Federal Highway Administration's Office of Motor Carrier Safety, as well as RSPA, in regard to the methodologies to be employed in such a study.

Other commenters requested an expansion of the exception to include products such as petroleum crude oil, and natural gas liquids and condensates. Petroleum crude oil and natural gas liquids are flammable liquid petroleum products and, as such, are already afforded the exception. RSPA is clarifying that although all flammable liquid petroleum products are included in the exception in § 173.8 (b) and (c), liquefied petroleum gases are not. The HMR currently provide for the use in intrastate commerce of certain non-specification cargo tanks for propane, see 173.315(k). RSPA does not believe that an expansion of the materials covered by the exceptions provided in this section is necessary or warranted.

Based on the foregoing and the changes described above, § 173.8 is otherwise adopted as proposed.

D. Exception for use of a Registered Inspector

RSPA received several comments regarding the proposed exception in § 180.409 that allows a person to perform an annual external visual inspection and leakage test on small cargo tank motor vehicles used

exclusively for flammable liquid petroleum fuels without being a registered inspector. Commenters to the SNPRM disagreed over this exception.

Commenters who opposed the exception stated that the use of substandard cargo tanks to transport hazardous materials over public highways would reduce safety. One commenter stated that registered inspector test costs were nominal, and that initially over 90% of all 3500-gallon tanks required repairs to pass the tests when such tests became mandatory under the part 180 requirements. After five years of annual testing, only 20–25% of tanks required repairs to pass the tests. Other commenters opposed to the proposal stated that the current requirement that inspectors be registered should be retained. They also believe that the training and qualifications of persons performing inspections, who are not registered, would not be adequate. The Idaho State Police stated: "Our previous first hand observations and experience indicate this absolutely will not work. Our inspections revealed all the tank defects that would have been found had the tanks been inspected. Several owners told us they had checked their tanks and did not see anything wrong with them. Many did not even know how to check internal valves for correct operation."

Commenters in support of the exception stated that it would provide "valuable relief to industry." They noted that using a registered inspector resulted in time away from their business to travel to a registered inspector site and financial hardship. A few commenters requested elimination of the annual leak test and the 5-year hydrostatic test altogether, and that RSPA should require a monthly visual inspection to be performed by the owner, including recordkeeping requirements. RSPA has also been asked by the Federal Highway Administration to clarify that the exception applies only to persons who perform visual inspection and leakage tests on their own cargo tank motor vehicles.

Prior to January 1, 1991, the HMR's inspection and periodic retest requirements did not apply to cargo tank motor vehicles with a capacity of 3,000 gallons or less used exclusively in flammable liquid service. This exception was fully evaluated and ultimately removed in a final rule published June 12, 1989 under Docket HM-183, [54 FR 24982]. RSPA determined that periodic tests were necessary for these small cargo tanks to ensure that product retention integrity is maintained. No new data was presented

for consideration sufficient to support a revision of this requirement.

After consideration of all comments, RSPA believes that the regulatory relief requested by small businesses, is not from the registration procedure itself, but is relief from the educational and years of experience requirements that prevent more persons who wish to perform these tests from registering. In addition, RSPA is clarifying that the exception from registration provided in § 180.409(c) for inspectors of non-bulk permanently secured tanks for flammable liquid petroleum fuel applies only to motor carriers who perform the annual visual inspection and leakage test on motor vehicles that they own or control.

In this final rule RSPA is providing exceptions from the education and years of experience requirements in the definition of "Registered Inspector" in § 171.8 for inspectors of small cargo tank motor vehicles carrying flammable liquid petroleum fuels. These inspectors must still register under Part 107 of this chapter. RSPA is also clarifying that this exception applies only if the person performs the annual external visual inspection and leakage tests on cargo tanks that they own or operate. In addition, inspectors of permanently mounted non-bulk tanks authorized under § 173.8(c) are totally excepted from the registration requirements. Motor carriers should be aware that the other tests required for these permanently mounted tanks by § 180.407(c), e.g., the periodic hydrostatic test, must be performed by a registered inspector. Cargo tank repair, modification, stretching and rebarreling are also required to be performed by a registered facility.

E. Exceptions for Agricultural Operations

RSPA received more than 500 comments from farmers and agricultural supply businesses who expressed concern that a final rule would prohibit states from granting exceptions for farmers. Some of these commenters agreed that, although uniform regulations promote consistent enforcement of the HMR, the nature of agriculture and its importance to their state's economy demands that farmers be granted some reasonable relief from the impact of full application of the HMR. Commenters alleged that the loss of intrastate exemptions would undoubtedly have a major economic impact on the agricultural industry. They also claimed that costs would be approximately \$2,000 to \$3,500 per year per farm. They strongly encouraged RSPA to develop an exception for

agricultural movements consistent with currently authorized state exceptions. Specific requests included exceptions for: (1) Agricultural products in movements of up to 5,000 pounds of a single class of hazardous material on a transport vehicle; (2) any quantity of agricultural products when diluted in water in preparation for field application; (3) ammonium nitrate fertilizer when transported in fertilizer application equipment in quantities of less than 468 cubic feet; and (4) diesel fuel and gasoline when transported in metal cargo tanks of up to 300 gallons capacity.

In a conference report (H.R. Rep. No. 785, 104th Cong., 2d Sess. 67 (1996)) accompanying the FY 1997 DOT appropriations bill, Congress expressed concerns that this rulemaking might increase compliance costs to farmers and agribusinesses and encouraged RSPA "to give serious consideration to establishing an agriculture exemption consistent with similar exemptions already granted by the department."

RSPA believes that confusion exists on the estimates of the burden of complying with the HMR. For example, a carrier who routinely transports the same hazardous material may use a "permanent" shipping paper by laminating a document containing the required description of the materials and emergency response information. In this circumstance, it is not necessary to prepare a new document for each trip. Other commenters believe that this final rule will require more farmers to obtain a commercial drivers license (CDL) or comply with a different level of financial responsibility. Nothing in this final rule will require any additional person to obtain a CDL, nor does it eliminate any waivers from the CDL authorized by the Federal Highway Administration. Other commenters still mistakenly believe that this final rule will require compliance with the Federal Motor Carrier Safety Regulations (FMCSR; 49 CFR Parts 390-397). For example, the Illinois Farm Bureau stated that for those farmers who haul hazardous materials, under the proposed regulation, part 391 of the FMCSR would be applied to them. As stated the preamble to the SNPRM, RSPA has determined that this final rule will not subject additional motor carriers, including farmers, to the provisions of the FMCSR. RSPA did not propose to and has not subjected any new motor carriers to the provisions of the FMCSR. The provisions of § 177.804 remain unchanged and do not extend the application of FMCSR requirements to motor carriers not currently required to comply with the FMCSR. The

regulations that address CDL requirements, financial responsibility requirements, and drug testing are independent requirements and nothing in this final rule impacts their applicability to a motor carrier.

RSPA agrees that agricultural operations should be recognized (see § 173.5 in the present regulations) in those States that have chosen to provide exceptions, but not necessarily to the same extent as the present state exceptions.

RSPA is adding definitions for "agricultural product" and "farmer" in § 171.8 and is providing exceptions from the requirements of Subparts G (Emergency Response Information) and H (Training) of Part 172 of this subchapter, in addition to exceptions already provided in § 173.5 for transport by farmers when such a transportation activity is authorized before July 1, 1998 by the State in which the transportation takes place. RSPA believes that the exceptions provided in §§ 173.5 (Agricultural operations), 173.6 (Materials of trade), and 173.8 (Exceptions for non-specification packagings used in intrastate transportation) will provide substantial though not total relief to farmers. For example, many small quantities of packaged hazardous materials meet the definition of materials of trade and may be transported with minimum shipping requirements, such as a general marking on the package to communicate hazard warning information, and notification to the motor vehicle operator of the materials of trade provisions for stowage and securely closing packages. Dilute materials (up to 2 percent concentration) in aqueous solutions that are properly classed as Class 9 materials will qualify for the materials of trade exception when in packagings having a capacity equal to or less than 1500 liters (400 gallons). In addition, flammable liquid petroleum products in intrastate transportation are authorized to be transported in small non-specification cargo tanks if authorized by the State before July 1, 1998. The other requirements of the HMR, including marking and placarding vehicles, hazmat training, shipping papers, emergency response information and emergency response telephone number requirements, except as stated in § 173.5(a) apply to the hazardous materials being transported under this section.

In addition to the other exceptions provided in this section, RSPA is providing an exception, under specified conditions, from the HMR for movements of agricultural products, excluding Class 2 materials, that are

moved between fields of a single farm. This exception applies to a farmer, who is an intrastate private motor carrier, and who transports an agricultural product between fields of his farm over local roads. Movement of the agricultural product must conform to the requirements of the State in which it is transported and must be specifically authorized by current State law or regulation in effect before July 1, 1998. For the purposes of this section, a local road does not include an "interstate highway." RSPA believes that this exception provides regulatory relief for farmers without compromising safety.

III. Regulatory Analyses and Notices

A. Executive Order 12866 and DOT Regulatory Policies and Procedures

This final rule is considered a significant regulatory action under section 3(f) of Executive Order 12866 and, therefore, was reviewed by the Office of Management and Budget. This final rule is considered significant under the Regulatory Policies and Procedures of the Department of Transportation (44 FR 11034) due to significant public and congressional interest. A regulatory evaluation is available for review in the Docket.

B. Executive Order 12612

This final rule has been analyzed in accordance with the principles and criteria contained in Executive Order 12612 ("Federalism"). The Federal hazardous materials transportation law (49 U.S.C. 5101-5127) contains an express preemption provision that preempts State, local, and Indian tribe requirements on certain covered subjects. Covered subjects are:

- (i) the designation, description, and classification of hazardous material;
- (ii) the packing, repacking, handling, labeling, marking, and placarding of hazardous material;
- (iii) the preparation, execution, and use of shipping documents pertaining to hazardous material and requirements respecting the number, content, and placement of such documents;
- (iv) the written notification, recording, and reporting of the unintentional release in transportation of hazardous material; or
- (v) the design, manufacturing, fabrication, marking, maintenance, reconditioning, repairing, or testing of a package or container which is represented, marked, certified, or sold as qualified for use in the transportation of hazardous material.

This rule concerns the packaging, marking, labeling, placarding and

description of hazardous materials on shipping papers. This rule preempts State, local, or Indian tribe requirements in accordance with the standards set forth above.

Thus, RSPA lacks discretion in this area, and preparation of a federalism assessment is not warranted. Title 49 U.S.C. 5125(b)(2) provides that if DOT issues a regulation concerning any of the covered subjects, DOT must determine and publish in the Federal Register the effective date of Federal preemption. That effective date may not be earlier than the 90th day following the date of issuance of the final rule and not later than two years after the date of issuance. RSPA determined that the effective date of Federal preemption for the requirements in this rule concerning covered subjects is January 1, 1998.

C. Regulatory Flexibility Act

This final rule will affect many small business entities that ship or transport hazardous materials, but any adverse economic impact should be minimal. Many small entities affected by this final rule will receive relief from current regulatory requirements. The regulatory evaluation developed in support of this final rule includes a benefit-cost analysis that favors its adoption, primarily due to the positive net benefits that may be realized by small entities.

RSPA estimates that 8,400 for-hire intrastate carriers that are small business entities will be affected by this rule. This is based on the best available data indicating there are approximately 420,000 trucks used in intrastate (208,000) or local (212,000) transportation services, and that nationwide statistics on truck use indicate approximately 2% of all trucks engaged in for-hire transportation carry hazardous materials. RSPA conservatively estimates that each of the 8,400 affected trucks is owned by a separate entity and that each operator is a small business.

In addition to entities engaged in purely intrastate for-hire transportation of hazardous material, this rule applies to motor vehicle operators engaged in agriculture, mining, construction, manufacturing, wholesale trade, retail trade, utilities, and a broad assortment of service industries, including lawn maintenance, plumbing, painting and welding. The Associated Builders and Contractors and the National Association of Plumbing-Heating-Cooling Contractors cite Bureau of Labor Statistics data in Employment and Wages Annual Averages 1992 that estimate there are 629,779 construction establishments, and that 533,455 of

these entities employ less than 10 persons. Data from the Small Business Administration indicate there are 73,000 plumbing companies, 24,000 welding companies, 26,000 lawn care service companies, and 31,000 painting companies. For these industries, there is no data readily available that distinguishes entities engaged in purely intrastate operations. RSPA conservatively estimates 90% of the total number do not operate outside their home state.

The minimal adverse economic impact on small entities is attributed to the fact that, because every State has already adopted hazardous materials transportation safety regulations, virtually every intrastate shipper or carrier of hazardous materials is already subject to regulations that are the same as or similar to those in the Federal Hazardous Materials Regulations (HMR). Twenty States have adopted the HMR in their entirety, and the vast majority of remaining States have adopted transportation safety regulations similar to the HMR. Many exceptions provided by the latter group of States are being incorporated in this final rule, especially with respect to agricultural operations (§ 173.5), materials of trade exceptions (§ 173.6), and exceptions for non-specification packagings used in intrastate transportation (§ 173.8).

The scope of the materials-of-trade exception is not restricted to purely intrastate motor carriers. Thus, RSPA is providing significant regulatory relief to small (and many large) entities that currently transport hazardous materials by motor vehicle in interstate commerce. These small entities now may carry certain hazardous materials in alternative packagings that provide equal or greater strength and integrity to DOT specification packagings, and the paperwork burden associated with preparation and retention of hazardous materials shipping papers is completely removed, as is the requirement for reporting incidents involving the unintentional release of a hazardous material that meets the criteria for a material-of-trade. In effect, RSPA believes there could be an aggregate net benefit to small entities whose transportation of hazardous materials is limited to materials of trade.

Based upon readily available information concerning the size and nature of entities likely affected by this final rule, I certify this rule will not have a significant economic impact on a substantial number of small entities under criteria of the Regulatory Flexibility Act.

D. Paperwork Reduction Act

Under the Paperwork Reduction Act of 1995, no person is required to respond to a collection of information unless it displays a valid OMB control number. Information collection requirements in 49 CFR parts 172 and 177 pertaining to shipping papers are currently approved under OMB control number 2137-0039. Information collection requirements contained in 49 CFR part 171 pertaining to incident reporting are currently approved under OMB control number 2137-0039.

Information collection requirements pertaining to cargo tank specification requirements, including testing, in 49 CFR part 180 are approved under OMB control number 2137-0014.

Requirements pertaining to marking of bulk containers in 49 CFR part 172 are approved under OMB control number 2137-0575. RSPA believes that any increase in burden as a result of this final rule has been offset by exceptions provided in this and other recent final rules. For example: increases in the burden for the preparation of shipping papers for intrastate transportation of hazardous materials will be offset by the exceptions from shipping paper requirements provided for materials of trade; and increased burdens resulting from intrastate motor carriers being required to submit incident reports have been offset by the elimination of the incident reporting requirements for limited quantities (see HM-222B; 61 FR 27166). RSPA will submit revised information collection burden estimates as a result of this final rule to OMB for approval prior to the compliance dates in this rulemaking.

E. Regulations Identifier Number (RIN)

A regulation identifier number (RIN) is assigned to each regulatory action listed in the Unified Agenda of Federal Regulations. The Regulatory Information Service Center publishes the Unified Agenda in April and October of each year. The RIN number contained in the heading of this document can be used to cross-reference this action with the Unified Agenda.

*List of Subjects**49 CFR Part 171*

Exports, Hazardous materials transportation, Hazardous waste, Imports, Incorporation by reference, Reporting and recordkeeping requirements.

49 CFR Part 173

Hazardous materials transportation, Packaging and containers, Radioactive

materials, Reporting and recordkeeping requirements, Uranium.

49 CFR Part 180

Hazardous materials transportation, Motor carriers, Motor vehicle safety, Packaging and containers, Reporting and recordkeeping requirements.

In consideration of the foregoing, 49 CFR parts 171, 173, and 180 are amended as follows:

PART 171—GENERAL INFORMATION, REGULATIONS, AND DEFINITIONS

1. The authority citation for part 171 continues to read as follows:

Authority: 49 U.S.C. 5101-5127; 49 CFR 1.53.

2. Section 171.1 is revised to read as follows:

§ 171.1 Purpose and scope.

(a) This subchapter prescribes requirements of the Department of Transportation governing—

(1) The offering of hazardous materials for transportation and transportation of hazardous materials in interstate, intrastate, and foreign commerce by rail car, aircraft, motor vehicle, and vessel (except as delegated at § 1.46(t) of this title).

(2) The representation that a hazardous material is present in a package, container, rail car, aircraft, motor vehicle, or vessel.

(3) The manufacture, fabrication, marking, maintenance, reconditioning, repairing, or testing of a packaging or container which is represented, marked, certified, or sold for use in transportation of hazardous materials.

(4) The use of terms and symbols prescribed in this subchapter for the marking, labeling, placarding and description of hazardous materials and packagings used in their transport.

(b) Any person who, under contract with any department, agency, or instrumentality of the executive, legislative, or judicial branch of the Federal Government, transports, or causes to be transported or shipped, a hazardous material or manufactures, fabricates, marks, maintains, reconditions, repairs, or tests a package or container which is represented, marked, certified, or sold by such person as qualified for use in the transportation of a hazardous material shall be subject to and comply with all provisions of the Federal hazardous materials transportation law, all orders and regulations issued thereunder, and all other substantive and procedural requirements of Federal, State, and local governments and Indian tribes (except any such requirements that have been

preempted by the Federal hazardous materials transportation law or any other Federal law), in the same manner and to the same extent as any person engaged in such activities that are in or affect commerce is subject to such provisions, orders, regulations, and requirements.

3. In § 171.8, the following definitions are added in alphabetical order:

§ 171.8 Definitions and abbreviations.

* * * * *

Agricultural product means a hazardous material, other than a hazardous waste, whose end use directly supports the production of an agricultural commodity including, but not limited to a fertilizer, pesticide, soil amendment or fuel. An *agricultural product* is limited to a material in Class 3, 8 or 9, Division 2.1, 2.2, 5.1, or 6.1, or an ORM-D material.

* * * * *

Farmer means a person engaged in the production or raising of crops, poultry, or livestock.

* * * * *

Material of trade means a hazardous material, other than a hazardous waste, that is carried on a motor vehicle—

(1) For the purpose of protecting the health and safety of the motor vehicle operator or passengers;

(2) For the purpose of supporting the operation or maintenance of a motor vehicle (including its auxiliary equipment); or

(3) By a private motor carrier (including vehicles operated by a rail carrier) in direct support of a principal business that is other than transportation by motor vehicle.

* * * * *

PART 173—SHIPPERS—GENERAL REQUIREMENTS FOR SHIPMENTS AND PACKAGINGS

4. The authority citation for part 173 continues to read as follows:

Authority: 49 U.S.C. 5101-5127; 49 CFR 1.53.

5. Section 173.5 is revised to read as follows:

§ 173.5 Agricultural operations.

(a) The transportation of an agricultural product other than a Class 2 material, over local roads between fields of the same farm, is excepted from the requirements of this subchapter when:

(1) It is transported by a farmer who is an intrastate private motor carrier; and

(2) The movement of the agricultural product conforms to requirements of the

State in which it is transported and is specifically authorized by a State statute or regulation in effect before July 1, 1998.

(b) The transportation of an agricultural product to or from a farm, within 150 miles of the farm, is excepted from the requirements in subparts G and H of part 172 of this subchapter when:

(1) It is transported by a farmer who is an intrastate private motor carrier;

(2) The total amount of agricultural product being transported on a single vehicle does not exceed:

(i) 7,300 kg (16,094 lbs.) of ammonium nitrate fertilizer properly classed as Division 5.1, PG III, in a bulk packaging, or

(ii) 1900 L (502 gallons) for liquids or gases, or 2,300 kg (5,070 lbs.) for solids, of any other agricultural product;

(3) The packaging conforms to requirements of the State in which it is transported and is specifically authorized for transportation of the agricultural product by a State statute or regulation in effect on or before July 1, 1998; and

(4) Each person having any responsibility for transporting the agricultural product or preparing the agricultural product for shipment has been instructed in the applicable requirements of this subchapter.

(c) Formulated liquid agricultural products in specification packagings of 220 L (58 gallons) capacity, or less, with closures manifolded to a closed mixing system and equipped with positive dry disconnect devices may be transported by a private motor carrier between a final distribution point and an ultimate point of application or for loading aboard an airplane for aerial application.

(d) See § 173.315(m) pertaining to nurse tanks of anhydrous ammonia.

(e) See § 173.6 pertaining to materials of trade.

6. A new § 173.6 is added to read as follows:

§ 173.6 Materials of trade exceptions.

When transported by motor vehicle in conformance with this section, a material of trade (see § 171.8 of this subchapter) is not subject to any other requirements of this subchapter besides those set forth or referenced in this section.

(a) *Materials and amounts.* A material of trade is limited to the following:

(1) A Class 3, 8, 9, Division 4.1, 5.1, 3.1, or ORM-D material contained in a packaging having a gross mass or capacity not over—

(i) 0.5 kg (1 pound) or 0.5 L (1 pint) for a Packing Group I material;

(ii) 30 kg (66 pounds) or 30 L (8 gallons) for a Packing Group II, Packing Group III, or ORM-D material;

(iii) 1500 L (400 gallons) for a diluted mixture, not to exceed 2 percent concentration, of a Class 9 material;

(2) A Division 2.1 or 2.2 material in a cylinder with a gross weight not over 100 kg (220 pounds); or

(3) A Division 4.3 material in Packing Group II or III contained in a packaging having a gross capacity not exceeding 30 ml (1 ounce).

(4) This section does not apply to a hazardous material that is self-reactive (see § 173.124), poisonous by inhalation (see § 173.133), or a hazardous waste.

(b) *Packaging.* (1) Packagings must be leak tight for liquids and gases, sift proof for solids, and be securely closed, secured against movement, and protected against damage.

(2) Each material must be packaged in the manufacturer's original packaging, or a packaging of equal or greater strength and integrity.

(3) Outer packagings are not required for receptacles (e.g., cans and bottles) that are secured against movement in cages, carts, bins, boxes or compartments.

(4) For gasoline, a packaging must be made of metal or plastic and conform to requirements of this subchapter or requirements of the Occupational Safety and Health Administration of the Department of Labor contained in 29 CFR 1910.106.

(5) A cylinder or other pressure vessel containing a Division 2.1 or 2.2 material must conform to packaging, qualification, maintenance, and use requirements of this subchapter, except that outer packagings are not required. Manifolding of cylinders is authorized provided all valves are tightly closed.

(c) *Hazard communication.* (1) A non-bulk packaging other than a cylinder (including a receptacle transported without an outer packaging) must be marked with a common name or proper shipping name to identify the material it contains, including the letters "RQ" if it contains a reportable quantity of a hazardous substance.

(2) A bulk packaging containing a diluted mixture of a Class 9 material must be marked on two opposing sides with the four-digit identification number of the material. The identification number must be displayed on orange panels or, alternatively, a white square-on-point configuration having the same outside dimensions as a placard (at least 273 mm (10.8 inches) on a side), in the manner specified in § 172.332 (b) and (c) of this subchapter. Each digit in the identification number marking must be

at least 25 mm (one inch) high and 6 mm (0.24 inch) wide.

(3) A DOT specification cylinder (except DOT specification 39) must be marked and labeled as prescribed in this subchapter. Each DOT-39 cylinder must display the markings specified in § 178.65-14.

(4) The operator of a motor vehicle that contains a material of trade must be informed of the presence of the hazardous material (including whether the package contains a reportable quantity) and must be informed of the requirements of this section.

(d) *Aggregate gross weight.* Except for permanently mounted tanks authorized by paragraph (a)(1)(iii) of this section, the aggregate gross weight of all materials of trade on a motor vehicle may not exceed 200 kg (440 pounds). A material of trade may be transported on a motor vehicle under the provisions of this section with other hazardous materials without affecting its eligibility for exceptions provided by this section.

7. A new § 173.8 is added to read as follows:

§ 173.8 Exceptions for non-specification packagings used in intrastate transportation.

(a) *Non-specification bulk packagings.* Notwithstanding requirements for specification packagings in subpart F of this part and parts 178 and 180 of this subchapter, a non-specification bulk packaging may be used for transportation of a hazardous material by an intrastate motor carrier until July 1, 2000, in accordance with the provisions of paragraph (d) of this section.

(b) *Non-specification cargo tanks for petroleum products.* Notwithstanding requirements for specification packagings in subpart F of this part and parts 178 and 180 of this subchapter, a non-specification cargo tank motor vehicle having a capacity of less than 13,250 liters (3,500 gallons) may be used by an intrastate motor carrier for transportation of a flammable liquid petroleum product in accordance with the provisions of paragraph (d) of this section.

(c) *Permanently secured non-bulk tanks for petroleum products.* Notwithstanding requirements for specification packagings in subpart F of this part 173 and parts 178 and 180 of this subchapter, a non-specification metal tank permanently secured to a transport vehicle and protected against leakage or damage in the event of a turnover, having a capacity of less than 450 liters (119 gallons), may be used by an intrastate motor carrier for transportation of a flammable liquid

petroleum product in accordance with the provisions of paragraph (d) of this section.

(d) *Additional requirements.* A packaging used under the provisions of paragraphs (a), (b) or (c) of this section must—

(1) Be operated by an intrastate motor carrier and in use as a packaging for hazardous material before July 1, 1998;

(2) Be operated in conformance with the requirements of the State in which it is authorized;

(3) Be specifically authorized by a State statute or regulation in effect before July 1, 1998, for use as a packaging for the hazardous material being transported;

(4) Be offered for transportation and transported in conformance with all other applicable requirements of this subchapter;

(5) Not be used to transport a flammable cryogenic liquid, hazardous substance, hazardous waste, or marine pollutant; and

(6) On and after July 1, 2000, for a tank authorized under paragraph (b) or (c) of this section, conform to all requirements in part 180 (except for § 180.405(g)) of this subchapter in the same manner as required for a DOT specification MC 306 cargo tank motor vehicle.

PART 180—CONTINUING QUALIFICATION AND MAINTENANCE OF PACKAGINGS

8. The authority citation for part 180 continues to read as follows:

Authority: 49 U.S.C. 5101–5127; 49 CFR 1.53.

9. In § 180.409, the introductory text of paragraph (a) is revised, paragraph (b) is redesignated as paragraph (d), and new paragraphs (b) and (c) are added to read as follows:

§ 180.409 Minimum qualifications for inspectors and testers.

(a) Except as otherwise provided in this section, any person performing or witnessing the inspections and tests specified in § 180.407(c) must—

* * * * *

(b) A person who only performs annual external visual inspections and leakage tests on a cargo tank motor vehicle, owned or operated by that person, with a capacity of less than 13,250 liters (3,500 gallons) used exclusively for flammable liquid petroleum fuels, is not required to meet the educational and years of experience requirements set forth in the definition of "Registered Inspector" in § 171.8 of this subchapter. Although not required to meet the educational and years of

experience requirements, a person who performs visual inspections or leakage tests or signs the inspection reports must have the knowledge and ability to perform such inspections and tests and must perform them as required by this subchapter, and must register with the Department as required by subpart F of part 107 of this chapter.

(c) A person who performs only annual external visual inspections and leakage tests on a permanently mounted non-bulk tank, owned or operated by that person, for petroleum products as authorized by § 173.8(c) of this subchapter, is not required to be registered in accordance with subpart F of part 107 of this chapter. In addition the person who signs the inspection report required by § 180.417(b) of this subpart for such non-bulk tanks is not required to be registered. Although not required to register, a person who performs visual inspections or leakage tests or signs the inspection reports must have the knowledge and ability to perform such inspections and tests and must perform them as required by this subchapter.

* * * * *

Issued in Washington, DC on December 30, 1996 under authority delegated in 49 CFR, part 1.

D.K. Sharma,
Administrator.

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DEPARTMENT OF TRANSPORTATION

Research and Special Programs Administration

49 CFR Parts 171, 172, 173, 174, 175, 176 and 177

[Docket No. HM–206; Amdt. Nos. 171–151, 172–151, 173–260, 174–84, 175–85, 176–42, 177–89]

RIN 2137–AB75

Improvements to Hazardous Materials Identification Systems

AGENCY: Research and Special Programs Administration (RSPA), DOT.

ACTION: Final rule.

SUMMARY: This final rule amends the Hazardous Materials Regulations (HMR) to better identify hazardous materials in transportation. Changes include adding a new "POISON INHALATION HAZARD" (PIH) label and placard to enhance the ready identification of materials which are poisonous if inhaled, lowering the quantity for specific hazard class placarding from

2,268 kilograms (5,000 pounds) to 1,000 kilograms (2,205 pounds) of one class or division of material loaded on a transport vehicle, expanding requirements for transport vehicles and freight containers that have been fumigated, and other enhancements to the hazard communication system. Improved identification of, and information about, hazardous materials in transportation assists emergency response personnel in responding to and mitigating the effects of incidents involving the transportation of hazardous materials, and improves safety to transportation workers and the public.

DATES: *Effective date:* October 1, 1997.

Compliance date: Voluntary compliance is authorized beginning February 11, 1997.

FOR FURTHER INFORMATION CONTACT : Helen L. Engrum, telephone (202) 366–8553, Office of Hazardous Materials Standards, Research and Special Programs Administration, U.S. Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590–0001.

SUPPLEMENTARY INFORMATION :

I. Background

A. The Current Hazard Communication System

The Hazardous Materials Regulations (HMR; 49 CFR Parts 171–180) include a wide variety of hazard identification and communication requirements for hazardous material shipments. These requirements are designed, in part, to provide fire and emergency response personnel, the public, and transport workers with information in the event of a transportation incident involving hazardous materials. Hazard communication and emergency response information requirements are set forth in Subparts C through G of Part 172 of the HMR.

During transportation, most non-bulk packages of a hazardous material must be marked with the shipping name and identification number of the material and must have a hazard warning label affixed to the package. Many shipments of hazardous materials must be identified by placards attached to the transport vehicle or bulk package. Most hazardous materials must be described and identified on a shipping paper that accompanies a shipment in transportation. A shipping paper must contain an emergency response telephone number that is monitored at all times the hazardous material is in transportation. This telephone number is used by emergency responders to